



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND
INTERFERENCES

Per Just Andersen, Ph.D.
and Simon K. Hodson

Serial No. 09/390,583

Confirmation No. 7141

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For: COATED STARCH-BASED COMPOSITIONS
AND METHODS FOR MANUFACTURING
STARCH-BASED COMPOSITIONS

Examiner: Leanna M. Roche

Art Unit: 1771

Appeal No.

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REPLY BRIEF OF APPELLANTS

Assistant Commissioner for Patents
Washington, D. C. 20231

Sir:

This is in reply to the Examiner's Answer (Paper No. 31) mailed September 27, 2002.

The Appeal Brief of Appellants pointed out with particularity how the Examiner failed (1) to correctly apply the proper legal test for recapture in a reissue application during prosecution and (2) to properly analyze the claims in light of the recapture test. Because of the apparent misunderstanding on the part of the Examiner as to how to apply the recapture test

during prosecution of the above-identified reissue application, Appellants were repeatedly and unfairly whip-sawed into trying different claiming strategies in an attempt to avoid the recapture rule.

Moreover, during an examiner interview and in subsequent telephonic interviews Appellants repeatedly requested guidance from the Examiner as to how Appellants could properly craft claims that would avoid the recapture rule. The Examiner provided no guidance. Instead, the Examiner continually took the absolutist position, contrary to the applicable case law, that a limitation relied on to avoid the prior art can never be broadened under any circumstances. When Appellants pointed out that applicable case law provided for an exception to the recapture rule when a claim is narrowed in other respects to claim overlooked aspects of the invention, the Examiner refused to even acknowledge that such an exception exists. Only now does the Examiner finally admit there is such a thing as an exception to the recapture rule. The current Examiner's Answer, to which this Reply Brief responds, perpetuates the confused position of the Examiner with regard to the application of the recapture rule and highlights the Examiner's inability or refusal to apply the correct test and correctly analyze the claims at issue.

The refusal on the part of the Examiner to provide even minimal guidance during prosecution *vis-à-vis* the exception to the recapture rule has resulted in extreme prejudice and harm to Appellants. Such harm can only be remedied by a ruling by the Board of Patent Appeals and Interferences ("Board") overturning the final rejection and entering an order that either (1) allows the claims as now presented or (2) provides instructions and guidance as to how the claims can properly be amended so as to fit within the exception and avoid the recapture rule. Failure of the Board to issue such remedies will result in a permanent loss of rights by

Appellants because the two-year window for filing a broadening reissue relative to the original patent has now passed.

This Reply Brief will now analyze and respond to the Examiner's Answer in detail.

I. THE EXAMINER'S ANSWER FAILS TO ARTICULATE A COHERENT RECAPTURE RULE, THEREBY PERPETUATING THE HARM TO APPELLANTS CAUSED BY THE EXAMINER'S FAILURE DURING PROSECUTION TO UNDERSTAND AND APPLY THE RECAPTURE RULE.

The Examiner's Answer perpetuates the failure on the part of the Examiner to correctly apply the recapture test. First, the Examiner's Answer attempts to justify the Examiner's initial decision to ignore the recapture rule altogether during prosecution by selectively quoting a portion of the MPEP, while ignoring the subsequent portion that articulates the exception to the recapture rule. Second, the Examiner's Answer admits that an exception to the recapture rule exists and purports to apply the recapture test articulated in *Pannu v. Storz Instruments, Inc.*, 258 F.3d 1366, 1371 (Fed. Cir. 2001). However, the Examiner's Answer fails to justify, or even address, the extreme prejudice to Appellants that arose due to the Examiner's continual failure to acknowledge the existence of the exception to the recapture rule until the final rejection from which this appeal was taken.

The fact that the Examiner only belatedly acknowledged that an exception to the recapture rule exists when issuing the final rejection underscores the utter lack of guidance provided by the Examiner regarding the exception to the recapture rule, even though Appellants repeatedly requested such guidance. Instead of providing guidance, or even applying a consistently correct rule, the Examiner's understanding and application of the recapture rule has been a moving target.

A. **The Examiner's Answer Incorrectly States the Recapture Test Set Forth in the MPEP, and in so Doing, Fails to Justify the Examiner's Error in Failing to Acknowledge the Existence of the Exception to the Recapture Rule During All of Prosecution Except in the last Final Rejection.**

The Examiner's Answer misstates the recapture rule set forth in the MPEP in an attempt to justify having failed to acknowledge the exception to the recapture rule during all of prosecution leading up to the final rejection, at which time the Examiner belatedly admitted that an exception exists. The Examiner's Answer does this by selectively quoting as follows only that portion of the MPEP that appears to support the Examiner's position during prosecution, while ignoring the subsequent portion that sets forth the exception to the recapture rule:

With regard to the application of pertinent case law, the examiner relied upon the two-part test set forth in the MPEP 1412.02, because the MPEP "contains instructions to examiners, as well as other material in the nature of information and interpretation, and outlines the current procedures which the examiners are required and authorized to follow in appropriate cases in the normal examination of a patent application." The MPEP was established as a guide which was created based on various binding decision by the court.... Thus, it is the position of the examiner that the rules set forth by the Federal Circuit have in no way been disregarded during examination.

Examiner's Answer, page 5 (emphasis in original).

By way of review, the "two-part test" set forth in the MPEP and referred to by the Examiner asks two questions to determine if the recapture rule presumptively applies. The first part of the test asks whether the reissue claims are in any respect broader than the issued claims. If not, the recapture rule does not apply. If they are broader in at least one respect, the second part asks whether they are broader with respect to a limitation that was added, argued or otherwise relied upon to avoid the prior art. If so, then the reissue claims seek to recapture subject matter that was "surrendered" during prosecution of the original claims, and the recapture

rule presumptively applies to bar the broadening amendment. According to this portion of the Examiner's Answer, and according to all but the last office action application of the second part of "two-part test" ends the inquiry.

Unfortunately, the Examiner's Answer, like the Examiner during prosecution, failed to take note of and apply the subsequent statement in MPEP 1412.02 regarding the exception to the recapture rule, which applies even when a claim seeks to recapture subject matter previously surrendered and which reads as follows:

If the broadening aspect of the reissue claim relates to subject matter previously surrendered, the examiner must determine whether the newly added narrowing limitation in the reissue claim no longer results in a recapture of the surrendered subject matter. If the narrowing limitation modifies the claim in such a manner that the scope of the claim no longer results in a recapture of the surrendered subject matter, then there is no recapture.

MPEP 1412.02, page 1400-15 (8th Ed., August 2001) (emphasis added). This statement in the MPEP clearly contemplates that an exception to the recapture rule exists and applies even "[i]f the broadening aspect of the reissue claim relates to subject matter previously surrendered" (*i.e.*, to a limitation that was amended, argued or otherwise relied on for patentability). According to the exception, "[i]f the narrowing limitation modifies the claim in such a manner that the scope of the claim no longer results in a recapture of the surrendered subject matter, then there is no recapture".

Thus, contrary to the alleged two-part test urged by the Examiner during prosecution and restated in the first part of the Examiner's Answer, the recapture rule contains, and has always contained, an exception that applies even if there is a "broadening aspect of the reissue claim [that] relates to subject matter previously surrendered". For this reason, the continued reliance

by the Examiner during the bulk of prosecution on the so-called “two-part test” to the exclusion of the exception to the recapture rule constitutes reversible error. Moreover, the Examiner’s Answer fails to cure or justify this error.

B. The Examiner’s Answer Misstates the Exception to the Recapture Rule in the same Manner as the Final Rejection.

Even though the Examiner’s Answer, like the last final rejection, reluctantly admits that an exception to the recapture rule exists, it misstates the rule articulated in the applicable case law. As clearly set forth in the Appeal Brief of Appellants, and in every amendment filed by Appellants during prosecution of the reissue application, the only Federal Circuit decision that is directly on point in the case of a “surrender by way of argument” is *Hester Indus., Inc. v. Stein, Inc.*, 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir. 1998). All of the other recapture cases cited by the Examiner and the MPEP involved a “surrender” resulting from a claim amendment. Thus, whereas such other cases may have, in *dicta*, referred to argument alone as giving rise to a possible surrender, only *Hester* actually considered and issued a binding ruling in a case that involved “surrender by way of argument”. *Id.*, 142 F.3d at 1481.

It is axiomatic that actual holdings by the Federal Circuit must be given precedence over mere *dicta* in unrelated decisions. Thus, the Board must look to *Hester* first and foremost when determining how to apply the recapture rule, particularly the exception to the recapture rule, in cases involving a “surrender by way of argument”. For the record, the reissue claims do not contain any broadening aspect relating to a claim limitation that was added by amendment during the original prosecution. Nor do the Examiner’s Answer and any of the previous office actions even allege that they do. Instead, the current position of the Examiner is that a surrender arose by way of argument alone and not because of an amendment. For this reason, it is astonishing

that the Examiner's Answer refuses to apply, or even minimally analyze, the recapture test set forth in *Hester* relating to a "surrender by way of argument". Instead, the Examiner's Answer cursorily mentions *Hester* and then, by slight of hand, collapses the recapture test and holding of *Hester* with two cases that did not involve surrender by argument but surrender by amendment (i.e., *Clement* and *Ball*).

Even more astonishing is the fact that one of the cases, *Ball Corp. v. United States*, 221 USPQ 289, 729 F.2d 1429 (Fed. Cir. 1984), contains a statement that actually supports Appellants' position, as clearly set forth in their Appeal Brief: "The proper focus is on the scope, of the claims, not on the individual features or elements purportedly given up during prosecution of the original application. *Ball*, 729 F.2d at 1437 (emphasis added). Yet the Examiner's Answer is entirely silent regarding what *Ball* actually states. Instead, the Examiner's Answer pretends that the sum total of all that these cases stand for is what the Examiner's Answer called the "two-part test" contained in the MPEP. Examiner's Answer, page 5. As shown above, the MPEP clearly teaches that the "two-part test" is not the end of the inquiry, contrary to the Examiner's position throughout most of the prosecution of this reissue application.

The exception to the recapture rule in the MPEP is consistent with *Hester*, which articulated the following recapture rule that should be applied in the case of "surrender by way of argument":

Finally, because the recapture rule may be avoided in some circumstances, we consider whether the reissue claims were materially narrowed in other respects. See, e.g., *Mentor [Corp v. Colorplast, Inc.]*, 998 F.2d [992,] 996, 27 USPQ2d [1521,] 1525 [(Fed. Cir. 1993)] ("Reissue claims that are broader in certain respects and narrower in others may avoid the effect of the recapture rule."); [*In re*] *Clement*, 131 F.3d [1464,] 1470, 45 USPQ2d [1161,] 1165 [(Fed. Cir. 1997)].

For example, in *Ball* the recapture rule was avoided because the reissue claims were sufficiently narrowed (described by the court as “fundamental narrowness”) despite the broadened aspects of the claims. 729 F.2d at 1438, 221 USPQ at 296. In the context of a surrender by way of argument, this principle, in appropriate cases, may operate to overcome the recapture rule when the reissue claims are materially narrower in other overlooked aspects of the invention. The purpose of this exception to the recapture rule is to allow the patentee to obtain through reissue a scope of protection to which he is rightfully entitled for such overlooked aspects.

Hester, 142 F.3d at 1482-83 (emphasis added). Thus, according to *Hester*, the recapture rule “may be avoided” if “the reissue claims are materially narrowing in other overlooked aspects of the invention”. The present reissue claims are materially narrower “in other overlooked aspects of the invention”, as clearly stated throughout prosecution of the reissue application. Thus, they define “a scope of protection to which [Appellants] are rightfully entitled”.

For example, the reissue claims are materially narrower with respect to the overlooked aspect of the invention that the claimed compositions have a starch-based region and a coating region adjacent to at least a portion of the starch-based region. In another overlooked aspect of the invention, the claims require the fibers to strengthen the starch-based region rather than simply have a minimum length. As set forth in the application, fibers do not necessarily strengthen starch-based compositions but can actually weaken them in some cases (*e.g.*, by not being well dispersed throughout the starch-bound matrix or by being in particulate form, as taught in the Tiefenbacher patent cited during the original prosecution and during reissue). In another overlooked aspect of the invention, the fibers in one reissue claim have a length that does not exceed 25 mm, whereas the issued claims contained no upper fiber length limitation. The specification teaches that fibers can be “25 mm or longer”. Col. 7, l. 40 (emphasis added).

All of these overlooked narrowing aspects of the invention relate to the physical properties of the claimed composition. Some of the materially narrowing aspects relate directly to the fiber limitation. Any one of them should suffice in avoiding the recapture rule according to *Hester*. Certainly all of them, taken as a whole in combination, should act to avoid the recapture rule according to the Supreme Court in *Ball*, which case was relied on by the Examiner in each of the office actions and the Examiner's Answer. According to *Ball*, "The proper focus is on the scope, of the claims, not on the individual features or elements purportedly given up during prosecution of the original application. *Ball*, 729 F.2d at 1437 (emphasis added). The problem with the Examiner's Answer is that it never analyzes the overall "scope" of the claims, as mandated by *Ball*. Instead, the Examiner's Answer, like the office actions during prosecution, ignores the Supreme Court and focuses entirely "on the individual features or elements purportedly given up during prosecution of the original application". This is plainly the wrong recapture test, as expressly stated in both *Ball* and applied in *Hester* in a case involving a "surrender by way of argument".

II. THE EXAMINER'S ANSWER, LIKE THE FINAL REJECTION, MISAPPLIES THE THREE-PART TEST OF PANNU BECAUSE IT FAILS TO CONSIDER THE MATERIALLY NARROWING ASPECTS OF THE REISSUE CLAIMS.

Appellants brought the recent Federal Circuit decision in *Pannu* to the attention of the Examiner during prosecution in order to persuade the Examiner that the recapture test still included a third part constituting the exception to the recapture rule. Appellants did so because the Examiner continually refused to admit that a third part even existed until *Pannu* was cited. *Pannu* conclusively established that the exception to the recapture rule was alive and well, contrary to the Examiner's previous position.

Nevertheless, because *Pannu* involved a surrender by amendment, rather than a surrender by way of argument, the specific manner in which *Pannu* articulates the exception to the recapture rule should apply only to a surrender by amendment. The proper recapture rule that applies in the case of a “surrender by way of argument” is succinctly stated in *Hester*, as discussed above. Thus, the purpose of citing *Pannu* was to convince the Examiner that the Federal Circuit still recognized the existence of the exception to the recapture rule in the hope that the Examiner would apply the exception articulated in *Hester*, which applies where there is “surrender by way of argument”. *Pannu* did not purport to overrule *Hester*, nor is *Pannu* directly on point such that it implicitly overruled or narrowed *Hester*. Thus, the three-part test in *Pannu*, while conclusive evidence that an exception to the recapture rule still exists, is not controlling in the present case. *Hester* controls. And as stated during prosecution, in the Appeal Brief, and above, the present reissue claims avoid the recapture rule following the test set forth in *Hester*.

Even if the three-part test of *Pannu* is the correct recapture rule, the Examiner’s Answer, like the final rejection, fails to apply the test correctly. Like the final rejection, the Examiner’s Answer performs only a cursory analysis, while ignoring the materially narrowing aspects of the claims. Rather than honestly trying to apply the three-part test of *Pannu*, the argument set forth in the Examiner’s Answer is mere window dressing intended to achieve the same result as was reached when the Examiner erroneously applied the “two-part test” to the exclusion of the exception to the recapture rule.

According to the Examiner’s Answer, the exception to the recapture rule stated in *Pannu* requires the claims to contain a narrowing aspect that is directly related to the broadened aspect. In reality, *Pannu* appears only to require the narrowing aspect to relate to the alleged “error” set forth in the reissue oath. See *Pannu*, 258 F.3d at 1371-72. In *Pannu* the alleged error was that

Applicant unnecessarily narrowed the scope of the claim with respect to the shape of the haptics”. *Id.* 258 at 1371. Thus, [c]orrection of Pannu’s unnecessary narrowing of claim 1 must involve a corresponding broadening of the reissue claim.” *Id.* Because the shape of the haptics was the only “error” alleged in the reissue oath, the Federal Circuit in *Pannu* refused to consider the materially narrowing effect of claim limitations that did not relate to the shape of the haptics:

The “continuous, substantially circular arc” limitation related to the shape of the haptics. The narrowing aspect of the claim on reissue, however, was not related to the shape of the haptics, but rather the positioning and dimensions of the snag resistant means.

Id. at 1372. Thus, the problem with the narrowing limitation in Pannu was not that it did not relate to the broadened aspects, per se, but that it did not relate to the “error” alleged in the reissue oath. *See. id.* at 1371-72.

In contrast, both the broadening and narrowing aspects in the present reissue claims that relate to the coating region of the claimed composition directly relate to the “error” alleged in the reissue oath. Reissue Declaration, filed March 23, 2001, ¶¶9-14. For this reason, the narrowing aspects should be considered to relate to “other overlooked aspects of the invention” according to *Hester*. They also directly relate to the alleged error in the reissue oath, as required by *Pannu*. Thus, regardless of whether the recapture test of *Hester* or *Pannu* is applied, the reissue claims in the present application avoid the recapture rule according to the exception articulated in either case.

Even if the extremely narrow exception to the recapture rule urged in the Examiner’s Answer were adopted (*i.e.*, that the claims must contain a narrowing aspect that directly relates to the broadened aspect), the present reissue claims still would avoid the recapture rule because

they include materially narrowing limitations that directly relate to the broadened aspect (*i.e.*, the fiber limitation).

The originally issued claims recite the inclusion of “a fibrous material having an average fiber length greater than about 2 mm”, together with a limitation relating to the aspect ratio and fiber dispersion. The original claims, however, did not contain any requirement that the fibrous material actually strengthen the claimed composition. Indeed, because the compositions defined by the issued claims contain significant water such that they are suitable “for molding into an article having a starch-bound cellular matrix”, the fibers do not inherently impart significant strength. As is clearly stated throughout the specification, the fibers impart strength to the final dried and hardened composition, not the aqueous composition.

In contrast to the issued claims, the reissue claims each contain the following materially narrowing limitations relating to the strengthening effect of the fibers within the claimed composition: (1) “fiber-reinforced starch-based composition” and (2) “the gelatinized component aids in the dispersion of the fibrous material throughout the intermediate aqueous starch-based composition during mixing in order for the fibrous material to strengthen the starch-based composition”. Reissue claim 32 (emphasis added). Thus, whereas the reissue claims include a broadening aspect relating to the fibers, namely that fibers shorter than 2 mm can be used, they also contain materially narrowing limitations relating to the fibers, namely that the fibers expressly “reinforce[]” and “strengthen” the starch-based composition. As set forth in the specification, the main reason for including fibers is for them to impart strength to the final starch-based compositions according to the invention. Requiring fibers having a minimum length of about 2 mm is but a crude approximation of the more important requirement that the fibers impart a strengthening effect. The reissue claims better define this important concept.

More importantly, from the standpoint of the recapture test urged by the Examiner's Answer, broadening the fiber limitation to include shorter fibers, while narrowing it to require fibers that impart a strengthening effect, both directly relate to the overall fiber limitation. Hence, the narrowing aspect of the fiber limitation directly relates to the broadened aspect, thus satisfying even the extremely narrow test set forth in the Examiner's Answer. This narrowing aspect of the fiber limitation was clearly argued in the Appeal Brief. Nevertheless, because the Examiner's Answer fails to address this point, Appellants' argument on this regard remains unrebutted by the Examiner. Instead, the Examiner's Answer only mentions another materially narrowing limitation that does not relate to the fiber limitation (*i.e.*, the coating limitation) when analyzing the reissue claims under the three-part *Pannu* test. Thus, the Examiner has unwittingly conceded this point to Appellants by refusing to address this important factual issue.

Finally, to the extent that the Examiner's position is that the narrowing aspect must somehow relate to the fiber length limitation, at least some of the claims also contain materially narrowing limitations relating to fiber length. Indeed, the Examiner's Answer states (erroneously) that the "newly amended claims contain the limitation that the fibrous material has a fiber length less than about 25 mm". Examiner's Answer, page 3. In fact, only dependent claim 33 contains this limitation. However, it should be noted that previously pending independent claims did, in fact, contain this limitation, which was ignored then, as it is now, by the Examiner when analyzing recapture under the three-part *Pannu* test.

As is readily apparent, the issued claims allowed for the inclusion of fibers having any length greater than about 2 mm, including fibers longer than 25 mm. In contrast, claim 33, like previously pending independent claims, specifically requires "fibers having a length less than about 25 mm". Thus, claim 33, like previously pending independent claims, contains a

materially narrowing limitation that directly relates to the fiber length limitation being broadened. Amazingly, the Examiner's Answer refers to this narrowing limitation at page 3 in order to initially demonstrate that the reissue claims are broader than the issued claims, but then conveniently ignores this same limitation when considering whether the claims have been narrowed in a manner that relates to fiber length at pages 6 and 7. This glaring oversight highlights the manner in which the Examiner has treated (*i.e.*, ignored) important factual issues during prosecution. This failure on the part of the Examiner to carefully analyze and consider critical factual issues throughout prosecution (and now during the appeal) emphasizes the unfairness to which Appellants have been subjected to.

Finally, Appellants also wish to point out that dependent claims 34, 51 and 57 also contain materially narrowing limitations relating to fiber length. Such claims require fibers whose maximum length (*i.e.*, "about 1.5 mm") is shorter than the minimum average fiber length (*i.e.*, "about 2 mm") required by the issued claims. It is hard to imagine a fiber length limitation that is more materially narrowing than the limitation contained in dependent claims 34, 51 and 57. Yet the Examiner failed to consider the fiber length limitations contained in claims 34, 51 and 57 during prosecution when applying the *Pannu* test. Likewise, the Examiner's Answer fails to presently address this limitation on appeal.

III. CONCLUSION.

In conclusion, Appellants submit that the reissue claims as currently presented avoid the recapture rule because they contain materially narrowing limitations that are directed to the "other overlooked aspects of the invention" recited in the reissue oath. Some of these narrowing limitations directly relate to the fiber limitation. Some narrowing limitations even relate

specifically to fiber length. Thus, under any application of the recapture rule, even the more narrow rule urged in the Examiner's Answer, at least some of the claims fall within the exception and therefore avoid the recapture rule.

Accordingly, Appellants respectfully request the Board to overturn the final rejection and enter an order directing the Examiner to allow the reissue claims. At a minimum, Appellants request the Board to recognize that Appellants have been unfairly prejudiced throughout the reissue proceeding due to the Examiner's failure to give any guidance as to how to draft claims that satisfy the exception to the recapture rule and to issue an order reopening prosecution to allow Appellants to present different claims that better avoid the recapture rule. In connection with the latter remedy, Appellants request the Board to clearly articulate a coherent and definitive exception to the recapture rule that both Appellants and the Examiner can understand and follow.

Dated this 27th day of November 2002.

Respectfully submitted,



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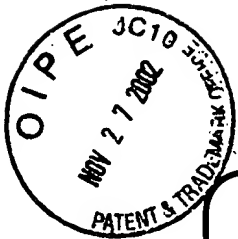
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